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Robotext Class Defendants May Benefit From Multi-District Consolidation Approach

Companies subject to multiple consumer Telephone Consumer Protection Act class actions should weigh the costs and benefits of a multi-district litigation (MDL) approach, privacy attorneys told Bloomberg BNA June 13.

These companies, such as ride-sharing giants Uber Technologies Inc. and Lyft Inc, may want to seek the lower cost and higher efficiency multi-district litigation approach, however, they should be wary of the risks involved combining multiple actions together, the attorneys said.

According to Bloomberg Law research, there are 13 active federal trial court TCPA cases against Uber and Lyft. All of these cases are being heard separately, even though some share claims for sending unsolicited marketing text messages without consumer consent.

''It is increasingly common'' to combine TCPA actions into MDLs, David Almeida, class action partner at Sheppard, Mullin, Richter & Hampton LLP in Chicago, said. ''Once a big name company is sued in a TCPA action it is very common to see tag-along suits'' in which many ''plaintiff's lawyers try to get a piece of the pie,'' he said.

With the rise of TCPA class actions for these companies, MDLs can be a haven for lower costs and avoidance for inconsistent rulings, he said.

But the bottom line is that corporate defendants in TCPA cases need to do a case-by-case analysis of whether consolidating cases to save costs might backfire. Possible negative rulings from a single court may have an outsize impact that companies should consider.

Ride-sharing services, such as Uber and Lyft, should consider that the CAN-SPAM Act for e-mails is easier to comply with than the TCPA is for texts, attorneys said.

Is MDL the Best Approach? MDLs can help lower costs and save time for both plaintiffs and defendants, but is it the best approach for a TCPA class action?

Troy Liberman, litigation attorney at Nixon Peabody International LLP in Boston and co-chair of the firm's TCPA practice, thinks that MDLs ''may not be the most effective mechanism'' for robotext cases because they tend to reach ''settlement quickly.''

Even though the Uber cases may have ''similar questions of fact,'' the MDL ''committee would be caught up with whether or not it would be the most effective use of time'' to pursue a consolidated case, he said.

Due to the unique nature of TCPA cases, MDLs may not actually reduce discovery costs, Liberman said. TCPA cases are much different from other MDL cases because ''they aren't time sensitive'' and obtaining the facts of the case ''aren't as expansive and time consuming'' as complex litigations like toxic torts, he said.

Also by consolidating cases under an MDL, a company may actually increase risks for an adverse ruling. ''When you have nine separate cases you can have a wide variety of decisions,'' which allows companies to mitigate risks from one negative ruling, Liberman said. If there is a negative ruling from a MDL judge, the company ''will have no argument to get out of things,'' he said.

At the end of the day, a company will have ''look at the court and the jurisprudence of the judge'' to decide if a MDL or tackling individual class actions is the right approach.

Almeida takes a different approach and believes MDLs for TCPA actions ''make a lot of sense.'' Because of the confusion surrounding the Federal Communication Commissions' ''lack of clarity in recent TCPA regulations—including on the issues of capacity and consent—it is better to have one judge evaluating these issues as opposed to a dozen or so judges across the country that may reach wildly varying outcomes,'' he said.

With a centralized process at the MDL level ''discovery and class certification can be extremely beneficial, not solely because of cost, but also so as to avoid inconsistent rulings—which are becoming very common in TCPA cases,'' Almeida said.

Push Notifications and E-Mail. Ride-sharing services that rely on mobile applications may better avoid civil liability by avoiding text messaging and sending e-mails or push notifications, the privacy attorneys told Bloomberg BNA.

Almeida said that ''e-mail and push notifications are great ways to avoid TCPA liability.'' Even with CAN-SPAM regulating e-mails, ''there is—with very minor exceptions—no private right of action'' nor is there a ''class action risk,'' he said.

Many companies, including Uber, have ''turned to push notifications to avoid TCPA liability,'' Almeida said. And even though ''the FCC hasn't spoken to this

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specifically, it's generally thought that push notifications will fall outside the TCPA,'' he said.

Liberman agreed that e-mails and push notifications are an interesting way around TCPA liability and that ''CAN-SPAM is much easier to comply with.''

But he cautioned that companies must look to state laws and regulations to avoid litigation at the lower courts. ''Recently, Connecticut passed a state TCPA law that is more robust than the federal statute,'' he said. The Connecticut law includes ''mobile push notifications,'' Liberman said.

Any company that has a mobile application and uses text messages, e-mails or push notifications would be best off being aware of both ''federal and state'' obligations to avoid liability, he said.

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